Comment

First Amendment Rights of Attorneys and Judges in Judicial Election Campaigns

I. INTRODUCTION

States that choose to elect their judges[1] must reconcile the conflict between the needs to preserve judicial neutrality and to maintain public respect for the legal system, and the political realities of election campaigns. The cornerstone of our electoral system is open debate during campaigns. The American Bar Association Model Code of Professional Responsibility (ABA Code),[2] however, allows attorneys much less latitude for criticism than is allowed laypeople during judicial election campaigns.[3] The policy requiring lawyers to maintain a higher standard of conduct in a contest for judicial office than is required by those seeking elected executive or legislative office is based on the unique characteristics of the judiciary. Ideally, the judiciary is a neutral body free from partisan political influence. Maintaining public respect for the laws and the courts is essential to the effective administration of justice.[4] Thus, any unprofessional conduct by lawyers that lessens public confidence in the legal system should be avoided.[5] Restricting attorneys' good-faith criticisms of judicial candidates precludes much of the debate that traditionally is associated with political campaigns. The ability of judges to respond to criticisms also is restricted by their duties as members of the bar and bench. Therefore, unlike other candidates for elected office, judges and judicial candidates are prohibited from engaging in politics at election time.

The first purpose of this Comment is to review relevant United States Supreme Court decisions and to discuss how their application to attorney criticism of judges in judicial campaigns would expand the scope of election debate. The second purpose is to review the standards that state courts apply in restricting attorney criticism and the limits they impose on judges' speech rights during judicial election campaigns. The third purpose of this Comment is to illustrate how overly restrictive standards infringe on the free speech rights of attorneys and judges. Finally, this Comment will propose a standard for speech that is less restrictive and maximizes the flow of information to voters during election campaigns.

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1. As of 1984, 24 states elect their state court judges, 11 states appoint all their judges, and 15 states use various mixed selection systems whereby judges are appointed and after a designated time must run for reelection. AM. JUR. 2D DESK BOOK, Item No. 76 (Supp. 1985). This Comment does not advocate any particular manner of state court judge selection. It is intended only to propose a standard of speech in judicial election campaigns for states that have chosen to elect their state court judges.

2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter cited as ABA CODE].

3. *See infra* notes 28–32 and accompanying text.

4. ABA CODE, *supra* note 2, EC 1–1, EC 1–5.

5. *Id.* DR 1–101 ("Maintaining Integrity and Competence of the Legal Profession").

II. Basic First Amendment Analysis in the Context of Judicial Election Campaigns

The first amendment prohibits Congress from making laws that abridge free speech.[6] Problems arise, however, in defining free speech. Libel and defamation,[7] fighting words,[8] obscenity,[9] and false statements[10] are not protected speech. Speech that clearly does not belong in one of these established unprotected categories receives varying degrees of constitutional protection.[11] Courts generally consider the importance of the communication[12] and the context of the communication[13] in determining the degree of protection that certain speech should receive. The United States Supreme Court has been especially skeptical of restrictions on speech that are aimed at suppressing the content of the communication.[14] A content-based restriction seeks to regulate what people may say rather than where or when they may speak.[15] Content-based restrictions, therefore, receive a high level of judicial scrutiny and will be upheld only if they are narrowly drawn to achieve "an important or substantial governmental interest [that] . . . is unrelated to the suppression of free expression."[16] In the context of attorney speech, content-based restrictions occur when attorneys are sanctioned for political comment in election campaigns.

Professional associations may limit further the free speech rights of their members to preserve the integrity of the particular profession.[17] The manner in which the legal profession restricts the speech of its members is set forth in the Code of Professional Responsibility (CPR). Adopted in 1970, the CPR replaced the former ABA Canons of Professional Ethics.[18] The present Code consists of nine canons covering various subjects, including professional integrity, competence, misconduct, improving the legal system, improper influence, respect toward the courts, and

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6. U.S. Const. amend. I. The first amendment provides: "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." *Id.* The rights of freedom of speech and press apply to the states through the due process clause of the fourteenth amendment. Gitlow v. New York, 268 U.S. 652, 666 (1925).

7. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974); New York Times Co. v. Sullivan, 376 U.S. 254, 268 & n.6 (1964); Beauharnais v. Illinois, 343 U.S. 250, 266 (1952).

8. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

9. *See, e.g.*, Miller v. California, 413 U.S. 15, 23 (1973); Roth v. United States, 354 U.S. 476, 485 (1957).

10. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974).

11. *See, e.g.*, New York Times Co. v. Sullivan, 376 U.S. 254, 270–71 (1964).

12. *See* Young v. American Mini Theatres, Inc., 427 U.S. 56, 61 (1976).

13. *See* FCC v. Pacifica Found., 438 U.S. 726, 748–50 (1978) (offensive speech broadcast on public airwaves may be banned because such speech is uniquely accessible to children). Although a total ban on offensive communication may be unconstitutional, offensive speech may be subject to greater restrictions when the Court feels it makes little contribution to the marketplace of ideas. *Id.* at 745–47.

14. Police Dep't v. Mosely, 408 U.S. 92, 95–96 (1972). *See also* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976) (statute prohibiting advertisement of prescription drug prices struck down as content-based restriction); Brandenburg v. Ohio, 395 U.S. 444 (1969) (statute prohibiting advocacy of criminal syndicalism struck down as content-based restriction).

15. *Compare* Carey v. Brown, 447 U.S. 455 (1980) (statute that makes distinctions based on the content of the speech is presumptively invalid) *with* Cox v. New Hampshire, 312 U.S. 569 (1941) (statute that addresses considerations of time, place, and manner only to conserve public convenience is presumptively valid).

16. United States v. O'Brien, 391 U.S. 367, 377 (1968).

17. Note, *Restrictions on Attorney Criticism of the Judiciary: A Denial of First Amendment Rights*, 56 Notre Dame Law. 489, 496 (1981).

18. T. Swisher, Professional Responsibility in Ohio 1.39 (1981).

avoiding impropriety.[19] The Code of Judicial Conduct (CJC),[20] adopted in 1972, replaced the former Canons of Judicial Ethics.[21] The CJC specifically governs judicial duties and restrictions on judges' activities. It contains seven canons covering a variety of topics including the integrity and impartiality of the judiciary, avoiding impropriety, and political activity.[22]

The ABA Model Code of Professional Responsibility imposes duties and restrictions on members of the legal profession through ethical considerations (EC's) and disciplinary rules (DR's).[23] The EC's are aspirational, but the DR's outline the minimum requirements of professional behavior[24] and may be enforced by reprimand,[25] suspension,[26] or disbarment.[27]

The rules governing attorneys' speech during judicial election campaigns are covered in Canon 8 of the ABA Code.[28] The Code imposes conflicting duties on attorneys by encouraging them to "protest earnestly against the . . . election of those who are unsuited for the bench,"[29] while requiring them to "be certain of the merit of [their] complaint[s], use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."[30] The purposes of the restrictions are to maintain respect for the legal system[31] and to protect judges who cannot fully defend themselves.[32]

Canon 7 of the CJC governs the political activity of judges and candidates for election.[33] Canon 7(B)(1)(c), which governs campaign conduct, is the section of the CJC most restrictive of speech, stating that a judicial candidate "should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position or other fact."[34] The purpose of the restrictions on campaign activities is to protect and

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19. *See* ABA CODE, *supra* note 2.

20. CODE OF JUDICIAL CONDUCT (1984) [hereinafter cited as CJC].

21. *Id.* (Preface).

22. *See* CJC, *supra* note 20.

23. ABA CODE, *supra* note 2 (Preliminary Statement). Similarly, the CJC outlines the ethical responsibilities of members of the judiciary.

24. *Id.*

25. *See In re* Baker, 218 Kan. 209, 542 P.2d 701 (1975); Columbus Bar Ass'n v. Riebel, 69 Ohio St. 2d 290, 432 N.E.2d 165 (1982); *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956).

26. *See* Columbus Bar Ass'n v. Harris, 1 Ohio St. 3d 33, 437 N.E.2d 596 (1982); *In re* Troy, 43 R.I. 279, 111 A. 723 (1920); Board of Law Examiners v. Spriggs, 61 Wyo. 70, 155 P.2d 285, *cert. denied*, 325 U.S. 886 (1945).

27. *See* Thatcher v. United States, 212 F. 801 (6th Cir. 1914), *reh'g denied*, 219 F. 173 (6th Cir. 1915), *appeal dismissed*, 241 U.S. 644 (1916); State v. Calhoon, 102 So. 2d 604 (Fla. 1958); State v. Nelson, 551 S.W.2d 433 (Tex. Civ. App. 1977).

28. ABA CODE, *supra* note 2, EC 8-6.

29. *Id.*

30. *Id.*

31. *Id.* EC 8-1.

32. *Id.* EC 8-6.

33. CJC, *supra* note 20, Canon 7.

34. *Id.* Canon 7(B).

preserve the impartiality and integrity of the judiciary.[35] States that apply these standards assume that there is a greater need to insulate judges from criticism than other officials.[36] It is not clear why judges are considered more vulnerable to criticism than other professionals, yet this proposition is relied on to justify the restrictions on attorneys' speech.[37]

The proposition that criticisms of attorneys and judges by attorneys and judges will unduly influence the public and degrade the legal system assumes that nonlawyers are politically immature and unable to accept the opinions of professionals for what they are worth and to reach their own conclusions.[38] The proposition also assumes that the public's confidence in the legal system is too fragile to withstand good-faith criticism by its members. However, requiring attorneys to refrain from comment unless they are convinced to a factual certainty of the merit of their complaints implicitly requires them to refrain from criticism in many situations. In other contexts, it has been recognized repeatedly that "erroneous statements are inevitable in free debate."[39] The danger of requiring attorneys to be sure their criticisms are true is that

> would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or . . . [t]hey [may] tend to make only statements which "steer far wider of the unlawful zone."[40]

The United States Supreme Court in *New York Times Co. v. Sullivan*[41] adopted a standard that, if applied to attorney speech, would avoid undue restrictions on comment during elections. In *New York Times*, the Court set forth a test for libel that is designed to allow the greatest amount of comment regarding the activities of public officials while also protecting them from malicious attacks.[42] To avoid undue state restrictions on speech, the *New York Times* rule limits the state's power to impose liability for criticism of the conduct of public officials to statements "made with

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35. *Id.* Canon 1 ("A judge should uphold the integrity and independence of the judiciary."); Morial v. Judiciary Comm'n, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978) (restrictions on judges' first amendment rights must be reasonably necessary to protect judicial integrity); *In re* Bonin, 375 Mass. 680, 693, 378 N.E.2d 669, 676 (1978) (a judge must avoid even the appearance of impropriety).

36. State *ex rel.* Comm'n on Judicial Qualifications v. Rome, 229 Kan. 195, 623 P.2d 1307 (1981).

37. *Id. See also* Chapman, *Criticism—A Lawyer's Duty or Downfall?*, 1981 S. ILL. U.L.J. 437.

38. *In re* Gorsuch, 76 S.D. 191, 199–200, 75 N.W.2d 644, 649 (1956). *See also infra* text accompanying note 109.

39. New York Times Co. v. Sullivan, 376 U.S. 254, 271 (1964).

40. *Id.* at 279 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)). The court in *New York Times* stated:

> Where judicial officers are involved, this Court has held that concern for the dignity and reputation of the courts does not justify the punishment as criminal contempt of criticism of the judge or his decision. . . . Such repression can be justified, if at all, only by a clear and present danger of the obstruction of justice. . . . If judges are to be treated "as men of fortitude, able to thrive in a hardy climate," . . . surely the same must be true of other government officials . . . .

Id. at 272–73 (quoting Craig v. Harney, 331 U.S. 367, 376 (1947)). This chilling effect on attorney speech is enhanced by the vagueness of the ABA Code. *See generally* Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, 65 IOWA L. REV. 1386 (1980); Note, *Disbarment: A Case for Reform*, 17 N.Y.L.F. 792 (1971); Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 N.C.L. REV. 671 (1979).

41. 376 U.S. 254 (1964).

42. *Id.* at 279–80.

'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.''[43]

Applying the *New York Times* rule to public criticisms of attorneys and judges would protect criticisms made in good faith. If attorneys negligently make false statements, they will be protected from sanctions. If they intentionally or recklessly make false statements, however, their speech will not be protected.[44] This standard allows attorneys and judges the same free speech rights as other citizens and should be applied to statements about the public activities of attorneys and judges in judicial election campaigns.

Application of the *New York Times* standard is justified because the need for open debate in an election campaign requires greater protection of attorney speech than may be sufficient in other contexts.[45] The public has a right to receive as much information as possible to make an educated choice. Because an informed electorate is crucial to an effective political process, states that elect their judges must recognize that people need information about the candidates if the election is to be more than a popularity contest.[46]

It is not disputed that the state has a significant interest in assuring that its elected judges are protected from malicious criticism and that judicial campaigns are run in a manner that preserves the integrity of state judges and the bar.[47] These interests, however, must be served through means that are not overly restrictive of attorney speech.

III. Application of Ethical Standards to Speech by Judges and Attorneys

A. *United States Supreme Court Decisions on the Right to Criticize Judges*

The United States Supreme Court has not addressed directly the issue of the free speech rights of attorneys in judicial election campaigns. However, the Court has ruled on the rights of the press[48] and other public officials[49] to criticize judges,[50] their rulings,[51] and the law[52] during trials[53] and election campaigns.[54] In several cases, the Court has reversed state supreme court decisions upholding convictions for criticism of judges. In *Bridges v. California*,[55] *Pennekamp v. Florida*,[56] and *Wood v. Georgia*,[57] the Court required the state to show that a clear and present danger to the

43. *Id.*
44. *See* Garrison v. Louisiana, 379 U.S. 64, 79 (1964).
45. *See infra* text accompanying notes 77–81.
46. *In re* Baker, 218 Kan. 209, 213, 542 P.2d 701, 705 (1975).
47. Berger v. Supreme Court, 598 F. Supp. 69, 75 (S.D. Ohio 1984).
48. *See* Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).
49. *See* Wood v. Georgia, 370 U.S. 375 (1962) (a sheriff).
50. *See* Garrison v. Louisiana, 379 U.S. 64 (1964).
51. *See id.*
52. *See In re* Sawyer, 360 U.S. 622 (1959) (criticism of Smith Act cases).
53. *See* Pennekamp v. Florida, 328 U.S. 331 (1946); Bridges v. California, 314 U.S. 252 (1941).
54. *See* Wood v. Georgia, 370 U.S. 375 (1962).
55. 314 U.S. 252 (1941).
56. 328 U.S. 331 (1946).
57. 370 U.S. 375 (1962).

administration of justice was extremely likely to result from the speech the state attempted to restrict.[58] The clear and present danger test as applied to threats to the administration of justice is "a working principle that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished."[59]

1. Bridges v. California *and* Pennekamp v. Florida

In *Bridges v. California*,[60] the Court reversed contempt convictions of a newspaper editor and a labor leader for their remarks in editorials commenting on cases pending in a state court. The Court held the convictions violated the first amendment.[61] The substantive evils asserted by the state in support of the contempt convictions were disrespect for the judiciary and disorderly and unfair administration of justice.[62] The Court responded:

> The assumption that respect for the judiciary can be won by shielding judges from published criticism wrongly appraises the character of American public opinion. For it is a prized American privilege to speak one's mind . . . on all public institutions. And an enforced silence, however limited, solely in the name of preserving the dignity of the bench, would probably engender resentment, suspicion, and contempt much more than it would enhance respect.[63]

In *Pennekamp v. Florida*,[64] the state instituted a similar contempt proceeding against a newspaper, charging that its publication of two editorials and a cartoon criticizing a Florida trial court impugned the integrity of, and tended to create a distrust for, the court.[65] The Court again reversed the conviction as violating the first amendment.[66] In *Pennekamp*, the Court accepted the state supreme court finding that the editorials and cartoons in question were a wanton withholding of the full truth.[67] However, the publications were found to be legitimate criticism that created no clear and present danger to the administration of justice.[68]

Pennekamp was decided before *New York Times*, but the Court adopted an analogous standard. The criticism, although untrue, was protected by the first amendment because "[i]n the borderline instances . . . , we think the specific

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58. Wood v. Georgia, 370 U.S. 375, 389 (1962); Pennekamp v. Florida, 328 U.S. 331, 348 (1946); Bridges v. California, 314 U.S. 252, 262–63 (1941). *Cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969) (speech advocating criminal syndicalism); Schenck v. United States, 249 U.S. 47, 52 (1919) (speech intended to obstruct the draft).

59. Bridges v. California, 314 U.S. 252, 263 (1941). *But see In re* Hinds, 90 N.J. 604, 618–23, 449 A.2d 483, 491–94 (1982) (a recent rejection of the clear and present danger test as applied to threats to the administration of justice).

60. 314 U.S. 252 (1941).

61. *Id.* at 273–75. Contempt proceedings, like disciplinary actions, are subject to constitutional scrutiny because the judiciary often is reviewing the acts of its own members without checks by the the executive or legislative branches. In addition, in order to prosecute for contempt, an actual obstruction to the administration of justice must exist. Nye v. United States, 313 U.S. 33, 48–50 (1941).

62. Bridges v. California, 314 U.S. 252, 270 (1941).

63. *Id.* at 270–71.

64. 328 U.S. 331 (1946).

65. *Id.* at 339.

66. *Id.* at 346–50.

67. *Id.* at 341, 345.

68. *Id.* at 347–48.

freedom of public comment should weigh heavily against a possible tendency to influence pending cases."[69] This is especially true during an election campaign where the value of good-faith criticism adds to public discussion of campaign issues.

There is a qualitative difference between first amendment rights in the context of a trial, as addressed in *Pennekamp*, and in an election campaign. In election campaigns, restrictions on speech are designed to protect the speakers and the integrity of the judicial system. During a trial, additional interests must be protected, and the danger of allowing unfettered discussion is more immediate. First amendment considerations during a trial must take account of not only the rights of the speaker and the public, but also of the defendant's constitutional rights. The right of a defendant to a fair trial may outweigh free speech rights of attorneys in the context of a trial. Since the election context lacks this factor, free speech during election campaigns should be more open than during trials.

In *Pennekamp*, the comments in issue were directed at elected judges and made reference to their handling of pending cases. The state suggested that the judges' neutrality might be affected by a desire to maintain public esteem and secure reelection at the cost of unfair rulings.[70] The Court refused to accept this debatable and remote harm based on a questionable assumption about the independence and fortitude of judges.[71] The Court stated that comments made about the judges would affect various judges differently. Some judges would not be affected at all by unpleasant criticism. The law cannot base an external standard on the varying degrees of moral courage of individual judges.[72]

2. Wood v. Georgia

In *Bridges* and *Pennekamp*, the free speech rights of the press to criticize judges outweighed the states' articulated but unproved interests in protecting the independence and neutrality of the judiciary and the fair and impartial administration of justice. The scope of first amendment freedom granted to the press has traditionally been greater than that allowed other speakers.[73] Therefore, the freedom of attorneys to comment on judicial action may not receive the same amount of "first amendment breathing space" as the press receives.[74] However, considered along with the standard applied by the Court in *Wood v. Georgia*,[75] *Bridges* and *Pennekamp* reveal some guidelines from which the rights of attorneys may be formed. In *Wood*, the Court applied the clear and present danger test set out in *Bridges* to the statements of a sheriff.[76] Therefore, the mere fact that the press may receive greater first amendment protection than individuals does not appear to control the outcome of the case.

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69. *Id.* at 347.
70. *Id.* at 349.
71. *Id.*
72. *Id.* at 348.
73. *See, e.g.*, Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980); Miami Herald Publishing Co. v. Tornillo, 418 U.S. 241 (1974).
74. *See* NAACP v. Button, 371 U.S. 415, 433 (1963).
75. 370 U.S. 375 (1962).
76. *Id.* at 391–93.

In *Wood,* an elected sheriff was convicted of contempt for criticizing a judge's instructions to a grand jury in the midst of a local election campaign.[77] Both the judge and the sheriff were candidates for reelection.[78] The Court reversed the conviction because there was no evidence that the news release actually obstructed the grand jury in any way. The conviction, therefore, violated Wood's right to freedom of speech because the state failed to show a clear and present danger to the administration of justice.[79] The Court also commented on the danger of restricting discussion and debate on important political issues during an election campaign.[80] The conviction restricted speech at the precise time when public interest and the need to inform the public of the matters discussed were at their height.[81]

3. *Application of the* New York Times *Standard to Attorney Criticism of Judges*

The United States Supreme Court has applied the *New York Times* malice standard[82] to attorney criticism of judges.[83] The conviction of a district attorney for accusing state court judges of laziness, inefficiency, and hampering his efforts to enforce the vice laws was reversed in *Garrison v. Louisiana.*[84] The Court held that the libel conviction of an attorney for criticism of official conduct of public officials violated the attorney's first amendment speech rights absent a showing that the statement was knowingly false or reckless.[85] The Court found a difference between an honest belief in an inaccurate statement and a deliberate lie; good-faith statements may contribute to public discussion, whereas conscious falsehoods do not serve to promote the exposition of ideas in any way.[86] Therefore, the attorney's criticism,[87] however caustic and unpleasant, did not lose its constitutional protection unless the state could prove it was made with knowledge of its falsity or with reckless disregard for the truth. The *Garrison* decision dealt with the first amendment protection of an attorney for good-faith criticism of a judge outside the election campaign context. Since the case for providing constitutional protection for good-faith criticism is even stronger in the context of an election campaign,[88] the protection afforded attorney speech in *Garrison* certainly should apply in the judicial campaign setting.[89]

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77. After the judge, in the presence of the news media, instructed the grand jury to investigate Negro bloc voting in the county, Sheriff Wood published a letter in the local newspaper in which he "urged the citizenry to take notice when their highest judicial officers threatened political intimidation and persecution of voters . . . under the guise of law enforcement." *Id.* at 379.

78. *Id.* at 381–82.

79. *Id.* at 388–89.

80. *Id.* at 392–93.

81. *Id.* at 392.

82. *See supra* text accompanying notes 41–43.

83. *See* Garrison v. Louisiana, 379 U.S. 64, 76 (1964).

84. 379 U.S. 64 (1964).

85. *Id.* at 74–75.

86. *Id.* at 75.

87. In a published statement issued at a press conference during which he criticized the judges, Garrison asserted, "This raises interesting questions about the racketeer influences on our eight vacation-minded judges." *Id.* at 66.

88. *See infra* p. 7.

89. See *infra* note 94 for cases in which the courts failed to recognize this seemingly obvious proposition.

The Court in *Garrison* allowed attacks on the official conduct of the judges. It held the attacks were protected by the public-official rule so as to preserve "the paramount public interest in a free flow of information to the people concerning public officials[;] . . . anything which might touch on an official's fitness for office is relevant."[90] There is no mention in the case of the danger of lessening the public's confidence in the judiciary, or of interfering with just or neutral rulings by the judges. The Court simply stated that in this context the value of allowing free speech on issues of public concern can only be restricted if the speech was made with malice.[91] That is, "[p]ersons who make derogatory statements about judges are protected by the first and fourteenth amendments from imposition of civil and criminal liability, unless the statement is made 'with knowledge that it was false or with reckless disregard of whether it was false or not.'"[92] State courts, however, often apply a higher standard to attorney criticism of the judiciary. The ABA Code prohibits an attorney only from making statements with knowledge of their falsity,[93] but attorneys have repeatedly been sanctioned for statements which they in good faith believed to be true.[94]

Absent the professional standards imposed on attorneys and judges by the ABA Code, the *New York Times* libel standard applied in *Garrison* would provide judges protection against attorneys who maliciously attack them. However, despite the holding in *Garrison*, applications of the ABA Code indicate that many states feel higher standards of professional conduct and greater restrictions on freedom of speech should be required during election campaigns to promote public confidence in the legal system and to protect judicial integrity.[95] The problem with serving these interests, however, is that they inhibit the flow of communication to the public regarding the quality of their elected officials at the point in time when this information is most needed.[96]

Applying a first amendment balancing test, the question is whether the public's right to know combined with attorneys' right to free speech outweighs state interests that are not compelling or significant. Attorneys have a right to comment freely on the qualifications and standards of their profession. Their experience makes them

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90. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

91. *Id.* at 77–78.

92. Eisenberg v. Boardman, 302 F. Supp. 1360, 1362 (W.D. Wis. 1969) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964)). *See also* Garrison v. Louisiana, 379 U.S. 64, 74 (1964).

93. ABA CODE, *supra* note 2, DR 8–102. This rule states:

(A) A lawyer shall not knowingly make false statements of fact concerning the qualifications of a candidate for election or appointment to a judicial office.

(B) A lawyer shall not knowingly make false accusations against a judge or other adjudicatory officer.

Id.

94. *See In re* Humphrey, 174 Cal. 290, 163 P. 60 (1917); State v. Calhoon, 102 So. 2d 604 (Fla. 1958); *In re* Baker, 218 Kan. 209, 542 P.2d 701 (1975); *In re* Raggio, 87 Nev. 369, 487 P.2d 499 (1971); *In re* Gorsuch, 76 S.D. 191, 75 N.W.2d 644 (1956); Board of Law Examiners v. Spriggs, 61 Wyo. 70, 155 P.2d 285, *cert. denied*, 325 U.S. 886 (1945). *But see* Thatcher v. United States, 212 F. 801 (6th Cir. 1914), *reh'g denied*, 219 F. 173 (6th Cir. 1915), *appeal dismissed*, 241 U.S. 644 (1916); Eisenberg v. Boardman, 302 F. Supp. 1360 (W.D. Wis. 1969); State v. Russell, 227 Kan. 897, 610 P.2d 1122, *cert. denied*, 449 U.S. 983 (1980); Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321 (Ky. 1955); *In re* Donohoe, 90 Wash. 2d 173, 580 P.2d 1093 (1978).

95. *In re* Baker, 218 Kan. 209, 542 P.2d 701 (1975); Board of Law Examiners v. Spriggs, 155 P.2d 285 (Wyo. 1945); CJC Canon 7(B)(1)(c).

96. Garrison v. Louisiana, 379 U.S. 64, 77 (1964).

knowledgeable about the workings of the profession. Their publicized concern with what they believe to be problems in the legal system provides the public with invaluable criticism.

The public's right to know also is implicated when attorney speech is restricted during election campaigns. "The public is affected greatly by the conduct and quality of lawyers and judges. It has an interest, therefore, in being informed about problems in the legal system."[97] The right to know is a right to receive information communicated by another person. This right has been recognized by the United States Supreme Court and "is important not only for truthseeking and collective decisionmaking but also for effectuating social change without violence or coercion."[98]

B. *State Court Standards Restricting Attorney Criticism of Judges*

The standards governing attorney conduct are established by each state. However, most states have adopted the ABA Code in full or with minor revisions.[99] Regardless, the application of the same rule in different states has resulted in very different outcomes. In addition, the rights and duties required by the ABA Code often result in conflicting obligations within a single proceeding.

The disciplinary rule governing EC 8–6 requires that attorneys have knowledge of the falsity of their criticisms before they can be sanctioned.[100] However, several cases involving EC 8–6 have applied a standard lower than knowingly false in sanctioning attorney speech.[101] EC 8–6 substantially dilutes the protection of DR's 8–102(A) and (B) stating that although a "lawyer as a citizen has a right to criticize [judges and administrative officials] publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system."[102] Other courts have applied the *New York Times* malice standard.[103]

It is established that an attorney candidate for judicial election may criticize the incumbent.[104] EC 8–6 requires that "[l]awyers should protest earnestly

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97. Note, *supra* note 17, at 501.

98. *Id.* at 502 (citing Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1, 2. *See generally id.*; Comment, *The Right to Receive and the Commercial Speech Doctrine: New Constitutional Considerations*, 63 GEO. L.J. 775 (1975). For cases that have recognized the right to know, see Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) ("people will perceive their own best interests only if they are well enough informed"); Procunier v. Martinez, 416 U.S. 396, 408–09 (1974) (prisoners' right to receive mail); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (right of citizens to obtain information of public concern through the media).

99. *See* Note, *Lawyer Disciplinary Standards: Broad vs. Narrow Proscriptions*, *supra* note 40, at 1386, 1387.

100. ABA CODE, *supra* note 2, DR 8–102. For a statement of DR 8–102, see *supra* note 93. *See also* Polk v. State Bar, 374 F. Supp. 784 (N.D. Tex. 1974); Justices of the Appellate Div. v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (mem.), *rev'g* 39 A.D.2d 223, 333 N.Y.S.2d 863 (1972); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974).

101. Note, *supra* note 17, at 495–97.

102. ABA CODE, *supra* note 2, EC 8–6.

103. *See* Eisenberg v. Boardman, 302 F. Supp. 1360 (W.D. Wis. 1969); State v. Russell, 227 Kan. 897, 903–04, 610 P.2d 1122, 1127–28 (1980); State Bar v. Semaan, 508 S.W.2d 429 (Tex. Civ. App. 1974).

104. *See, e.g.*, Thatcher v. United States, 212 F. 801, 807 (6th Cir. 1914), *reh'g denied*, 219 F. 173 (6th Cir. 1915), *appeal dismissed*, 241 U.S. 644 (1916); *In re* Baker, 218 Kan. 209, 214, 542 P.2d 701, 706 (1975); *In re* Gorsuch, 76 S.D. 191, 197–98, 75 N.W.2d 644, 648 (1956); *In re* Donohoe, 90 Wash. 2d 173, 181, 580 P.2d 1093, 1097 (1978).

against . . . those who are unsuited for the bench . . . ."[105] However, this right to criticize has been construed narrowly against the speaker with the result that attorneys often speak at their peril during election campaigns. As one commentator has pointed out, "[a]llowing an attorney to evoke the first amendment but then requiring him to face possible disbarment as a penalty for doing so affords no real protection."[106] Fear of sanctions may severely limit public debate during judicial election campaigns, thereby infringing upon the voter's right to make an informed choice.

Courts often require attorneys to be certain that their statements are true. A mere good-faith belief in a statement that is ultimately determined to be false or misleading has been grounds for the imposition of sanctions.[107] Statements of opinion are often difficult to prove true or false. However, courts that narrowly construe the ABA Code do not appear to make any distinction between a factually verifiable statement and a subjective expression of opinion.[108]

However, "the American people as a whole are politically mature and have had much experience in weighing statements made in an election campaign. The name calling, the unfair charges, the innuendoes and the destructive criticisms so characteristic of an election contest are not taken too seriously by the voters."[109] The voters, therefore, should be able to receive freely the good-faith opinions of lawyers regarding judicial candidates. They then can make individual choices based on all of the available information. Making judicial elections a relatively open process informs the public. Restricting the flow of information—even damaging information—to keep the public ignorant is not a constitutionally permissible reason to restrict attorney speech.[110] As Mr. Justice Brandeis stated, "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[111]

C. *State Court Standards Limiting Speech by Judges and Candidates in Election Campaigns*

Two cases, *Morial v. Judiciary Commission*[112] and *Berger v. Supreme Court*,[113]

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105. ABA CODE, *supra* note 2, EC 8–6.

106. Chapman, *supra* note 37, at 445.

107. *See* State v. Calhoon, 102 So. 2d 604, 609 (Fla. 1958); Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980), *cert. denied*, 449 U.S. 1101 (1981); Kentucky State Bar Ass'n v. Lewis, 282 S.W.2d 321, 324 (Ky. 1955). *See also supra* note 94 and accompanying text.

108. *See* Kentucky Bar Ass'n v. Heleringer, 602 S.W.2d 165, 168 (Ky. 1980) (attorney publicly criticized judge's action as highly unethical and grossly unfair), *cert. denied*, 449 U.S. 1101 (1981); Kentucky Bar Ass'n v. Nall, 599 S.W.2d 899, 899 (Ky. 1980) (attorney described proceeding before a hearing officer of an administrative body as a "mere farce" and a "Kangaroo Court"); *In re* Raggio, 87 Nev. 369, 371, 487 P.2d 499, 500 (1971) (attorney criticized court's opinion as a "most shocking . . . example of judicial legislation at its very worst"). *But see* State v. Russell, 227 Kan. 897, 903, 610 P.2d 1122, 1127 (false statements in bad taste that are largely political rhetoric cannot be the basis for discipline), *cert. denied*, 449 U.S. 983 (1980); Justices of the Appellate Div. v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (mem.) (attorney's degrading, vulgar criticism of the law and courts not subject to sanction), *rev'g* 39 A.D.2d 223, 333 N.Y.S.2d 863 (1972).

109. *In re* Gorsuch, 76 S.D. 191, 199, 75 N.W.2d 644, 649 (1956).

110. *See* Linmark Assocs., Inc. v. Willingboro, 431 U.S. 85, 96–97 (1977).

111. *Id.* at 97 (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)).

112. 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

113. 598 F. Supp. 69 (S.D. Ohio 1984).

involved preconduct challenges to the CJC. Because there was an actual threat of prosecution for the proposed activity in both cases, preconduct challenges to the validity of laws infringing first amendment rights were appropriate. In neither case was the CJC found to be facially unconstitutional. However, the cases reveal the serious problems involved in the CJC restrictions imposed on judicial candidates.

1. Morial v. Judiciary Commission

Morial involved a challenge to CJC Canon 7(A)(3), which requires judges to resign their position before announcing their candidacy for nonjudicial office.[114] Morial, a state appellate court judge, was interested in becoming a nonparty candidate for Mayor of New Orleans. His request for a leave of absence to run for mayor was denied unanimously by both the Louisiana Supreme Court and that court's Committee on Judicial Ethics.[115] Morial and thirteen of his supporters then filed suit in Federal District Court challenging Canon 7(A)(3) as violating their first amendment rights of free speech and association and their fourteenth amendment right to equal protection.[116]

The United States District Court for the Eastern District of Louisiana granted the plaintiffs declaratory and injunctive relief, holding that Canon 7(A)(3) created a chilling effect on the first amendment rights of Morial and his supporters.[117] Because Louisiana had chosen to elect its judges, the court held it could not treat judge-candidates differently from any other candidates. Consequently, judge-candidates have the rights of expression and association which are inherent in the right to run for public office.[118] The activities necessary to candidacy include the rights to publicly debate and to advocate viewpoints on political issues.[119] Morial's supporters' constitutional rights were violated because the Canon infringed on their rights to vote and to associate.[120] The associational rights of Morial's supporters included the right to support their chosen candidate and the right to hear that candidate's views.[121] The freedom to associate includes the right of people to form a group and support a

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114. Morial v. Judiciary Comm'n, 565 F.2d 295, 297 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). CJC, *supra* note 20, Canon 7(A)(3) provides:

> A judge should resign his office when he becomes a candidate either in a party primary or in a general election for non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

Id.

115. Morial v. Judiciary Comm'n, 565 F.2d 295, 297 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

116. Morial v. Judiciary Comm'n, 438 F. Supp. 599, 605 (E.D. La.), *rev'd*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

117. *Id.* at 608.

118. *Id. See, e.g.*, William v. Rhodes, 393 U.S. 23 (1968).

119. Morial v. Judiciary Comm'n, 438 F. Supp. 599, 608 (E.D. La.), *rev'd*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

120. *Id.* at 609. *See, e.g.*, Reed v. Giarrusso, 462 F.2d 706 (5th Cir. 1972); Moore v. Moore, 229 F. Supp. 435 (S.D. Ala. 1964).

121. Morial v. Judiciary Comm'n, 438 F. Supp. 599, 608–09 (E.D. La.), *rev'd*, 565 F.2d 395 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

candidate. The court in *Morial* found that these rights are necessary to make individuals' freedom of expression effective.[122]

Because the court in *Morial* held that CJC Canon 7(A)(3) infringed upon plaintiffs' fundamental rights of expression and association, the burden of proof shifted to the state to show a compelling governmental interest in the restrictions.[123] The court agreed that avoiding actual impropriety and the appearance of impropriety on the part of judges are compelling interests.[124] However, the court ruled that the Canon, which was not imposed on other public officials, was not a necessary or even a reasonably necessary means by which to achieve that goal.[125] The state failed to show that campaigns have an inherently corrupting influence on candidates or that campaign conduct affects judges' ethics or citizens' respect for the judiciary.[126] The court concluded:

> [T]he State's policy is hypocritical. It requires a Judge to be constantly seasoned in the political process, and then seeks to gloss over this political exposure by the thin facade of the Canon . . . which [is] designed to give the public the idea that even though Judges are elected, that they are not necessarily required to engage in politics at election time.[127]

The district court's decision in favor of the plaintiffs was reversed by the United States Court of Appeals for the Fifth Circuit.[128] The Fifth Circuit did not question the plaintiffs' standing or the ability of the district court to decide the constitutional issues.[129] The court, however, adopted the view that the state has the power to impose broad restrictions on the political activities of federal and state civil servants, and this power extends to the activities of a public official.[130] Further, the court refused to recognize the right to candidacy as fundamental.[131] Therefore, the Canon's restrictions were valid only if they were reasonably necessary to achieve a compelling public objective.[132] Notably, this standard is lower than the standard the district court applied which required the state to prove that the restrictions were actually necessary to achieve the compelling state interest.[133] The Fifth Circuit first addressed the plaintiffs' interests. Morial's interest in being free to run for nonjudicial office, while important, was not a fundamental right. The court stated that "candidacy for office is one of the ultimate forms of political expression in our society,"[134] but decided that

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122. *Id.* at 609.
123. *Id.* at 611.
124. *Id.*
125. *Id.*
126. *Id.* at 612.
127. *Id.* at 606.
128. Morial v. Judiciary Comm'n, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).
129. *Id.*
130. Morial v. Judiciary Comm'n, 565 F.2d 295, 300 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). The Fifth Circuit relied on the Hatch Act cases. *E.g.*, United States Civil Service Comm'n v. National Ass'n of Letter Carriers, 413 U.S. 548 (1973); Broadrick v. Oklahoma, 413 U.S. 601 (1973) (the Court specifically approved restrictions on the rights of federal and state civil servants to be candidates for public office). The Fifth Circuit applied the reasoning of these cases to sitting judges. Morial v. Judiciary Comm'n, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).
131. Morial v. Judiciary Comm'n, 565 F.2d 295, 301 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978). *See also* Bullock v. Carter, 405 U.S. 134, 142–44 (1972).
132. Morial v. Judiciary Comm'n, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).
133. *See supra* text accompanying notes 123–27.
134. Morial v. Judiciary Comm'n, 565 F.2d 295, 301 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

Morial had other means through which he could exercise his political beliefs. He could vote or make public statements outside the campaign context.[135] The resignation requirement was found to have even less of an impact on voters because no identifiable group or viewpoint was excluded from the electoral process.[136]

On the other hand, the state contended that important interests were served by insuring the impartiality of the judiciary:

> The specific evils targeted are three. First, the state wishes to prevent abuse of the judicial office by a judge-candidate during the course of the campaign. The state also wishes to prevent abuse of the judicial office by judges who have lost their electoral bids and returned to the bench. Finally, Louisiana asserts an interest in eliminating even the appearance of impropriety by judges . . . .[137]

Because the Canon only had to be reasonably necessary to achieve the compelling interest in preserving the integrity of the judiciary, the state was not required to show that any of the asserted evils it sought to avoid were likely results of the plaintiff's proposed candidacy.[138] Conversely, the district court, which applied a much higher level of scrutiny, found the state's asserted interests unpersuasive because the state produced no evidence relating to lack of judicial integrity in political campaigns.[139] The district court's more penetrating analysis also found that these interests could be served through means less restrictive of speech.[140]

The result of the application of different levels of scrutiny by the district court and the court of appeals in *Morial* is illuminating. By applying a lower level of scrutiny, the court of appeals considerably reduced the judge's first amendment rights. The district court, however, was convinced that the degree of speech restriction sanctioned in *Morial* can be justified only when the dangers of allowing the speech are proven and no reasonable alternatives less restrictive of speech exist.[141]

2. Berger v. Supreme Court

Berger v. Supreme Court[142] involved a preconduct challenge to Canon 7(B)(1)(c) of the CJC on the ground that it violated Berger's first amendment rights. Canon 7(B)(1)(c) prohibits a candidate for judicial office from making promises "of conduct in office other than the faithful and impartial performance of the duties of the office."[143] Berger, a candidate for the office of Judge of the Cuyahoga County Court of Common Pleas, Division of Domestic Relations, wanted to discuss his views publicly and to make certain pledges and promises regarding reform in the Domestic

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135. *Id.*

136. *Id.* at 301–02. *But see* Lubin v. Panish, 415 U.S. 709 (1974) (exclusion of poor); Turner v. Fouche, 396 U.S. 346 (1970) (exclusion of blacks); Williams v. Rhodes, 393 U.S. 23 (1968) (exclusion of new political parties).

137. Morial v. Judiciary Comm'n, 565 F.2d 295, 302 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

138. *Cf. supra* text accompanying notes 48–87.

139. Morial v. Judiciary Comm'n, 438 F. Supp. 599, 611–12 (E.D. La.), *rev'd*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

140. *Id.* at 611.

141. *See supra* text accompanying notes 123–27.

142. 598 F. Supp. 69 (S.D. Ohio 1984).

143. CJC, *supra* note 20, Canon 7(B)(1)(c).

Relations Division.[144] Berger also wanted to criticize the administration of domestic relations law, especially the excessive use of trial referees by the court.[145]

Berger's preconduct challenge was based in part on a disciplinary proceeding against a judicial candidate pending in the Supreme Court of Ohio.[146] The United States District Court for the Northern District of Ohio accepted Berger's argument on standing, namely that statements by Ohio's Disciplinary Counsel created an actual threat of prosecution should Berger proceed to make his proposed comments.[147] Ohio Disciplinary Counsel, Anthony Gagliardo, had made clear his view that Canon 7(B)(1)(c) prohibits candidates for judicial office "from making comments that are critical of the incumbent, regardless of the truth or falsity of those allegations."[148]

Although the court agreed with Berger that there was a sufficient threat to his first amendment rights to grant him standing, the court did not accept Berger's argument that 7(B)(1)(c) had a chilling effect on his right to free speech. Instead, the court interpreted Canon 7(B)(1)(c), contrary to the Disciplinary Counsel's position, as allowing criticism of an incumbent that is not false or misleading and thus found it unnecessary to grant injunctive relief.[149] Therefore, until the Supreme Court of Ohio authoritatively speaks on the issue, Canon 7(B)(1)(c) as interpreted by the *Berger* court is facially constitutional in Ohio.

The reading of Canon 7(B)(1)(c) employed by the district court appears to be a warning to Ohio's Disciplinary Counsel. The Counsel's interpretation of the Canon was disregarded by the court because only the supreme court of the state has the power to conclusively interpret the CJC.[150] Moreover, the court did not appear to accept the constitutionality of an interpretation of the Canon that would prohibit all statements critical of an incumbent judge.[151]

IV. A Proposed Standard of Campaign Conduct Less Restrictive of First Amendment Rights

Courts traditionally have construed the ABA Code as allowing attorneys much less latitude for criticism than is allowed nonattorneys during judicial election campaigns.[152] For example, a nonattorney may negligently make false statements about a candidate, whereas an attorney is subject to possible sanction for making such statements. These restrictions on attorneys' speech are said to be essential to preserve the integrity and independence of the judiciary and to maintain public confidence in the legal system.[153] The effect of these restrictions is to insulate the judiciary from criticism by its most qualified critics. The conflict between judicial norms and

144. Berger v. Supreme Court, 598 F. Supp. 69, 72 (S.D. Ohio 1984).

145. *Id.*

146. *Id.*

147. *Id.* at 73–74. *See also* Steffel v. Thompson, 415 U.S. 452 (1974) (the threat of prosecution is enough to present a justiciable controversy).

148. Berger v. Supreme Court, 598 F. Supp. 69, 73 (S.D. Ohio 1984).

149. *Id.* at 75.

150. *Id.*

151. *Id. See also In re* Baker, 218 Kan. 209, 542 P.2d 701 (1975).

152. *See supra* notes 93–94 and accompanying text.

153. *See supra* notes 31–32 and accompanying text.

political reality often results in unnecessary infringement on attorney speech and an underinformed electorate.

A more effective balance between the first amendment interests of attorneys and the public on the one hand and the need to maintain confidence in the legal system on the other hand must be established. This goal can be effected by applying the *New York Times* rule[154] to attorney and judicial speech during election campaigns. The United States Supreme Court in *Garrison v. Louisiana*[155] explained how this rule should be applied to comments about judges:

> The reasonable-belief standard . . . is not the same as the reckless-disregard-of-truth standard. . . . [A] reasonable belief is one which "an ordinary prudent man might be able to assign a just and fair reason for"; . . . the immunity from . . . responsibility in the absence of ill-will disappears on proof that the exercise of ordinary care would have revealed that the statement was false. The test which we laid down in *New York Times* is not keyed to ordinary care; defeasance of the privilege is conditioned, not on mere negligence, but on reckless disregard for the truth.[156]

It is especially important to protect as much open debate as possible during a judicial election campaign when the need for discussion of issues is at its peak.[157] Two state court decisions have applied the *New York Times* rule outlined in *Garrison* to attorneys' speech, thus balancing the need to maintain respect for the judiciary against first amendment considerations.[158] Neither of these cases involved speech during election campaigns; however, the context of an election campaign only strengthens the argument for applying the *New York Times* rule.

In *Eisenberg v. Boardman*,[159] two attorneys brought an action in the United States District Court for the Western District of Wisconsin to enjoin a state court disciplinary proceeding brought against them.[160] They argued that the Wisconsin statute requiring attorneys to take an oath to maintain the respect due the courts and judicial officers violated their first amendment speech rights.[161] The complaint in the disciplinary proceeding alleged that the "defendants . . . pursued a course of vindictive and reckless harassment"[162] against a judge which resulted in his suicide. The court rejected the first amendment challenge because the Wisconsin Supreme Court had applied the *New York Times* rule in its interpretations of the statute.[163] Thus, the malice standard was applied to attorneys in Wisconsin on the same terms as other citizens for statements made outside the courtroom.

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154. *See supra* text accompanying notes 41–44.

155. 379 U.S. 64 (1964).

156. *Id.* at 79. *See also supra* text accompanying notes 82–92.

157. Wood v. Georgia, 370 U.S. 375, 392–93 (1962). *See also supra* text accompanying notes 75–81.

158. *See* Eisenberg v. Boardman, 302 F. Supp. 1360 (W.D. Wis. 1969); Justices of the Appellate Div. v. Erdmann, 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (mem.), *rev'g* 39 A.D.2d 223, 333 N.Y.S.2d 863 (1972).

159. 302 F. Supp. 1360 (W.D. Wis. 1969).

160. *Id.* at 1361.

161. *Id.*

162. *Id.*

163. *Id.* at 1362–63 & n.3. *See also In re* Cannon, 206 Wis. 374, 409, 240 N.W. 441, 455 (1932) (An attorney has a right to make public utterances seeking to correct abuses, or what he believes to be abuses, on the part of the judiciary. "It best conforms to the spirit of our institutions to permit everyone to say what he will about courts, and leave the destiny of the courts to the good judgment of the people.").

Addressing the danger of engendering disrespect for the judiciary, the court found that the state's interest was outweighed by the interests of the attorneys and the public. The court refused to analyze the motives of the attorneys, preferring to rely on the "combined sober judgment of the voters . . . in the long run to protect the courts from calumny, abuse, and unfounded criticism."[164] In *Eisenberg*, the balance between the state's interest in maintaining respect for the judiciary was outweighed by the attorney's right to free speech because the state's interest was promoted rather than impaired by disseminating information to the public. Presumably, the court relied on the theory that the most effective manner in which truth is ascertained is to allow free criticism of candidates and an opportunity for rebuttal.

The Court of Appeals of New York also applied the *New York Times* rule in *Justices of the Appellate Division v. Erdmann*.[165] The Court of Appeals reversed the Appellate Division, which found that Erdmann's statements offended the dignity and integrity of the courts, tended to create disrespect for judicial officers generally, and lessened public confidence in the legal system.[166] In a memorandum decision, the Court of Appeals found that "[w]ithout more, isolated instances of disrespect for the law, Judges and courts expressed by vulgar or insulting words . . . are not subject to professional discipline."[167] Erdmann's opinions, although tasteless, would be interpreted by the public as an attorney's personal opinion as opposed to an authoritative factual conclusion.

In formulating a new standard for attorney speech in judicial election campaigns, it must be kept in mind that a restriction on free speech can survive judicial scrutiny under the first amendment only if certain fundamental conditions are met. First, the limitation must "further an important or substantial governmental interest unrelated to the suppression of expression."[168] Second, the restriction must be "no greater than is necessary or essential to the protection of the particular governmental interest involved."[169] The court must weigh the gravity and the probability of the harm caused by freely allowing the expression against the extent to which free speech rights would be inhibited by suppressing the speech.[170]

When the state interest is the effective administration of justice, the speech must present a clear and present danger to the administration of justice before it can be punished.[171] Some courts apply this standard to extrajudicial statements by attor-

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164. Eisenberg v. Boardman, 302 F. Supp. 1360, 1364 (W.D. Wis. 1969) (quoting *In re* Cannon, 206 Wis. 374, 409, 240 N.W. 441, 455 (1932)).

165. 33 N.Y.2d 559, 301 N.E.2d 426, 347 N.Y.S.2d 441 (1973) (mem.), *rev'g* 39 A.D.2d 223, 333 N.Y.S.2d 863 (1972). Mr. Erdmann, in an article published in *Life* magazine, was quoted as saying of New York's First Judicial Department: "There are so few trial judges who just judge, who rule on questions of law, and leave guilt or innocence to the jury. And Appellate Division judges aren't any better. They're the whores who became madams." *Id.* at 560, 301 N.E.2d at 426, 347 N.Y.S.2d at 442 (1973) (Burke, J., dissenting).

166. *Id.* at 559, 347 N.Y.S.2d at 441, 301 N.E.2d at 427 (majority opinion).

167. *Id.*

168. Procunier v. Martinez, 416 U.S. 396, 413 (1974).

169. *Id.*

170. *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 562 (1976) (citing United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951)).

171. *See supra* text accompanying notes 55–59.

neys.[172] Other courts, applying the ABA Code, have upheld abridgements of attorney speech by requiring the state to show only that the speech is reasonably likely to interfere with the administration of justice.[173] This latter standard lowers the level of judicial scrutiny and results in acceptance of any plausible state interest.[174] Under this statement, the state is not required to show that the restriction on speech is not any greater than necessary to serve the legitimate state interest.[175]

A better standard would require the state to prove by clear and convincing evidence that an attorney's speech actually impaired an important or compelling governmental interest.[176] The court in *Polk v. State Bar*[177] utilized this stricter standard requiring a showing that a significant interest was actually impaired before the state could regulate an attorney's free speech rights under the guise of prohibiting professional misconduct.[178] To show a significant state interest, the state had to prove that the attorney was incompetent or dishonest or that the attorney's conduct affected the administration of justice.[179] Interestingly, the court defined conduct affecting the administration of justice as "bribery of jurors, subornation of perjury, [and] misrepresentation to a court."[180] By requiring the state to prove that the actual effect of the criticism was harmful, the *Polk* court rejected restrictions which define "maintaining respect for the legal system" amorphously and which thus violate an attorney's free speech rights without showing an adequate countervailing state interest. Even if courts refuse to require the state to show a compelling interest, the decision in *Polk* demonstrates that requiring an actual showing of harm to a significant state interest can better protect an attorney's first amendment rights.

V. CONCLUSION

Attorneys and judges are subject to sanctions for expressing criticisms of the courts, laws, and judges. The standards used to impose these sanctions vary from state to state. The standards most restrictive of speech discipline attorneys for comments that are not "wellfounded, on a high plane, factual, and not personal."[181] This duty is imposed on attorneys to maintain public respect for the courts "not for the sake of

172. *See, e.g., In re* Oliver, 452 F.2d 111 (7th Cir. 1971); Chase v. Robson, 435 F.2d 1059 (7th Cir. 1970); United States v. Marcano Garcia, 456 F. Supp. 1354 (D.P.R. 1978).

173. *See* Morial v. Judiciary Comm'n, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978); *In re* Hinds, 90 N.J. 604, 449 A.2d 483 (1982).

174. *Compare* Morial v. Judiciary Comm'n, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978) *with* Morial v. Judiciary Comm'n, 438 F. Supp. 599 (E.D. La.), *rev'd*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

175. *See supra* text accompanying notes 123–41.

176. *See, e.g.*, Morial v. Judiciary Comm'n, 438 F. Supp. 599, 611 (E.D. La.), *rev'd*, 565 F.2d 295 (5th Cir. 1977), *cert. denied*, 435 U.S. 1013 (1978).

177. 374 F. Supp. 784 (N.D. Tex. 1974).

178. *Id.* at 788.

179. *Id.*

180. *Id.*

181. *In re* Donohoe, 90 Wash. 2d 173, 181, 580 P.2d 1093, 1097 (1978) (quoting R. WISE, LEGAL ETHICS 21 (1966)).

the temporary incumbent of the judicial office, but for the maintenance of its supreme importance."[182]

Under this standard, the rights of attorneys are different from other citizens. The Supreme Court of Nevada described the duty of an attorney to the courts and judicial officers:

> We are never surprised when persons, not intimately involved with the administration of justice, speak out in anger or frustration about our work and the manner in which we perform it, and shall protect their right to so express themselves. A member of the bar, however, stands in a different position by reason of his oath of office and the standards of conduct which he is sworn to uphold.[183]

This standard views the maintenance of the integrity of the judicial system as outweighing all but the most innocuous statements by attorneys.

A better standard, applied by some courts, is the *New York Times* rule.[184] This standard allows attorneys to express their opinions freely without fear of sanctions. The courts should not seek to regulate attorney speech on the basis of taste, civility, or morality. Sanctions are appropriate only when statements are malicious or when they present an actual clear and present danger to the administration of justice.[185]

Judges and candidates for judicial office should have the same free speech rights as other attorneys and elected officials. If attorneys are given greater freedom to criticize judges and the courts, judges likewise should be free to respond to criticism and to defend their records.[186] Opening up the judicial election process will not only protect the right to politicial expression for members of the bar and judiciary, but also will produce a more informed electorate and thus a more enlightened electoral process.

Elizabeth I. Kiovsky

182. Board of Law Examiners v. Spriggs, 61 Wyo. 70, 81, 155 P.2d 285, 289, *cert. denied*, 325 U.S. 886 (1945).
183. *In re* Raggio, 87 Nev. 369, 372, 487 P.2d 499, 500 (1971).
184. *See supra* notes 41–44 and accompanying text.
185. *See supra* text accompanying notes 49–98.
186. *See In re* Baker, 218 Kan. 209, 542 P.2d 701 (1975).